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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 UNITED STATES OF AMERICA,

5 v.

18 Cr. 289 (SHS)

6 BRYAN DUNCAN,

7 Defendant.

Sentence

8 -----x
9 New York, N.Y.
10 July 27, 2020
11 11:00 a.m.

12 Before:

13 HON. SIDNEY H. STEIN,

14 District Judge

15 APPEARANCES

16 AUDREY STRAUSS
17 Acting United States Attorney for
18 the Southern District of New York
19 BY: NICHOLAS W. CHIUCHIOLO
20 Assistant United States Attorney

21 HALSCOTT MEGARO PA
22 Attorneys for Defendant
23 BY: PATRICK M. MEGARO

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1 (Case called)

2 MR. CHIUCHIOLO: Good morning, your Honor. Nicholas
3 Chiuchiolo on behalf of the United States. I'm joined by
4 Special Agent Richard Prince with the Federal Bureau of
5 Investigation.

6 MR. MEGARO: Good morning, your Honor. Patrick
7 Michael Megaro on behalf of Mr. Duncan.

8 THE COURT: Good morning. You may be seated in the
9 courtroom.

10 Mr. Duncan is present as well.

11 This is the continuation of the sentencing proceeding
12 and the conclusion of the sentencing proceeding of Mr. Duncan
13 in this matter.

14 For the record, there is a national pandemic
15 currently, and one of the major hot spots is Florida, where
16 Mr. Megaro is based. Mr. Megaro is the attorney who was
17 substituted in the place of Ms. Al-Shabazz, who asked to
18 withdraw, and that application was granted. Unfortunately,
19 Mr. Megaro has recently tested positive for COVID-19, and
20 because Florida is a so-called hot spot -- indeed, it has the
21 highest number of new COVID cases in the country, I believe,
22 and I believe also recently surpassed New York's high of cases
23 and the large number of deaths as well. In any event,
24 Mr. Megaro would have to quarantine in Florida, and then after
25 he arrived in New York would have to quarantine for 14 days as

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1 well. It did not make sense for Mr. Megaro to come up, and I
2 think the 14-day period of quarantine has expired in Florida.
3 In any event, there was a telephone conference with Mr. Duncan
4 on the phone in which we decided it made sense for Mr. Megaro
5 to remain in Florida and to participate in the conclusion of
6 the sentencing proceeding by telephone.

7 Now, we have set up a separate line between
8 Mr. Megaro's cell phone and Mr. Duncan's cell phone. I
9 instructed the marshals to allow Mr. Duncan to bring his cell
10 phone into court.

11 Mr. Duncan, you have the right not only to be present
12 before me during sentencing in court -- and you're here now, so
13 that right is being effectuated -- but you also have the right
14 to have your attorney physically next to you, and that can't be
15 because he's in Florida. What I've done is, again, with the
16 participation of Mr. Megaro himself, obviously, you can talk to
17 Mr. Megaro at any time you want. He has his cell phone. You
18 have your cell phone. All you have to do is say, "Your Honor,
19 I'd like to talk to my attorney," and then you can go outside
20 and talk to your attorney at any time whatsoever. And you also
21 have the right to have him speak on your behalf, and because,
22 as you see, he's on the speakerphone here as well as he has his
23 cell phone, he'll be able to do that.

24 Do you understand that, Mr. Duncan?

25 THE DEFENDANT: Yes, your Honor.

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1 THE COURT: And do you agree to proceed in this
2 fashion?

3 THE DEFENDANT: Yes, your Honor.

4 THE COURT: All right. I accept that as a knowing,
5 voluntary and willing waiver to have the attorney physically
6 here. Actually, I think we've done very well in in that you'll
7 have the complete ability to speak with him privately at any
8 time here.

9 Now, on January 7, I initiated the sentencing
10 proceedings here, and I took the sentencing proceeding almost
11 right to its conclusion. What I did not do was impose
12 forfeiture and impose restitution because there was an
13 objection at that point. The government had not yet submitted
14 the restitution, and I believe Ms. Al-Shabazz had an opposition
15 to the forfeiture amount. So what I have to do today is deal
16 with the forfeiture, deal with the restitution, formally impose
17 sentence, give the appeal rights to Mr. Duncan -- the
18 government has indicated it was going to dismiss the open
19 counts, which I believe are Counts Two and Three -- and set a
20 surrender date, and I intend to do that.

21 There have been a great number of submissions here,
22 increasing in frequency here, as time went on, and indeed, I
23 received a letter. I think it was filed about nine or ten last
24 night, which was Sunday night, asking for an adjournment, which
25 I denied. The time has come to conclude this matter.

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1 Now, I've read everything. I presided over the trial,
2 so everyone knows I'm quite familiar with it. I do not need
3 argument on restitution or forfeiture. Anyone can tell me
4 whatever they like, but I assure you I really don't need
5 additional argument. We had a full presentation by
6 Ms. Al-Shabazz on behalf of Mr. Duncan. I will allow
7 Mr. Megaro to tell me whatever he wants, but again, we have a
8 full record here. And I will allow Mr. Duncan to address the
9 Court as well, with the same statement; I'm fairly comfortable
10 I understand the issues here. And in the interest of fairness,
11 obviously, I'll let the government say anything it wants.

12 Mr. Megaro, is there anything you wish to bring to my
13 attention? Again, I repeat I've read all the submissions,
14 including your most recent objection, sir.

15 Mr. Megaro.

16 MR. MEGARO: Yes. Thank you, your Honor.

17 There's a couple of things. I spoke with AUSA Nick
18 Chiuchiolo earlier this morning, and he informed me the
19 government was going to alter the restitution and forfeiture
20 numbers downwardly. I'm assuming it's in response or in
21 conjunction with the investigation they completed or they at
22 least started very recently and in connection with their
23 application to adjourn the proceedings last night. I'll
24 address that in a moment, but the only thing -- and I know the
25 Court has read my July 17 submission in its entirety. There's

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1 only two things I wish to add.

2 First, I went back over the *Honeycutt* case from the
3 Supreme Court that I cited in my July 17, 2020, submission, and
4 something caught my eye there that I thought was extremely
5 illuminating and would assist this Court.

6 Now, the *Honeycutt* case was a unanimous decision in
7 the Supreme Court, which we don't see very often. It was only
8 three years ago. It was an 8-0 decision only because Justice
9 Gorsuch did not take part in the deliberation or consideration
10 of the case, but the *Honeycutt* case dealt with restitution and
11 forfeiture. And they gave a prime example that I think is
12 particularly appropriate for this case, and I'm going to read
13 it almost verbatim because I couldn't state it any better:

14 An example is instructive. Suppose a farmer
15 masterminds a scheme to grow, harvest and distribute marijuana
16 on local college campuses. The mastermind recruits a college
17 student to deliver packages and pays the student \$300 each
18 month from the distribution proceeds for his services. In one
19 year the mastermind earns 3 million. The student, however,
20 earns \$3,600. If joint and several liability applied, the
21 student would face a forfeiture judgment for the entire amount
22 of the conspiracy's proceeds, 3 million. The student would be
23 bound by that judgment even though he never personally acquired
24 any proceeds beyond the \$3,600. This case requires
25 determination whether this form of liability is permitted under

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1 Section 853(a)(1). The court holds that it is not.

2 And the reason why I bring that up, your Honor, is
3 because that is, I think, precisely what is going on here. The
4 government is seeking forfeiture and restitution for amounts
5 that my client never actually received. If he received any
6 proceeds, they were a portion of what the settlement amounts
7 paid out on these allegedly fraudulent claims for. The
8 attorneys, I believe, are the ones that received the lion's
9 share of the amounts, not my client, and that ties into another
10 argument that I made about proximate responsibility or
11 proximate causation.

12 Mr. Duncan didn't initiate the insurance claims, he
13 didn't initiate litigation, and he didn't settle this case.
14 The attorneys are the ones that are proximately responsible for
15 the litigation settling from insurance companies.

16 Now, regarding restitution, the second thing I wanted
17 to bring up -- I'm turning to that point now -- the government
18 is now changing the restitution amount to remove three out of
19 the six people that were paid out on allegedly fraudulent
20 claims, and I have not been able to do the exact math, but as I
21 understand it, that reduces Mr. Duncan's exposure somewhere in
22 the neighborhood of \$400,000 on restitution.

23 Regarding forfeiture, the government has indicated to
24 me that they're going to reduce the amount of forfeiture
25 they're seeking to approximately 40 percent of the original

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1 amount, which is roughly, instead of 1.6 million, it is now
2 roughly \$644,000. Both of these reductions, in my opinion, and
3 I submit to this Court, indicate that the numbers do not quite
4 add up. They're not based on what I believe is a sound
5 methodology, and basically, in short, and I'll conclude with
6 this, if the government is not confident in their calculation,
7 then the Court cannot be confident in that calculation.

8 For these reasons, I would ask that the Court not
9 impose restitution and, for the reasons I set forth in my
10 letter, of course, I would ask that the Court not impose the
11 forfeiture amount sought by the government.

12 THE COURT: All right. Thank you.

13 Mr. Chiuchiolo, first of all, again, the government
14 submitted, at nine or 10 p.m. last night, its response. I did
15 not catch that the government was seeking a downward revision.
16 I know you were seeking a revision. I didn't realize it was
17 downward for both restitution and forfeiture. Is that correct?

18 MR. CHIUCHILO: That's correct, your Honor.

19 THE COURT: All right. You didn't say that hours
20 before this.

21 MR. CHIUCHILO: Your Honor, there's a portion of the
22 forfeiture calculation that the government wanted to further
23 investigate that might upward -- move the forfeiture number
24 upward, but the upshot of our total revisions would move both
25 restitution and forfeiture downwards, and I'm happy to

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1 elaborate for the Court on that.

2 THE COURT: I don't know about that yet, right?

3 MR. CHIUCHIOLO: Correct.

4 THE COURT: The major part of Mr. Duncan's sentencing
5 was completed on January 7, correct?

6 MR. CHIUCHIOLO: Correct, your Honor.

7 THE COURT: All right. What do you want to tell me?
8 Let's do the bottom line. What is the forfeiture amount the
9 government is now seeking? You've submitted a proposed
10 preliminary order of forfeiture, which becomes final upon
11 signing, in the sum of \$1,610,140.75; it has some specificity.
12 What is the amount the government is now seeking?

13 MR. CHIUCHIOLO: Your Honor, this amount the
14 government believes vastly understates the criminal proceeds,
15 but because we are unable to complete our investigation, which
16 we think would move the needle significantly upwards from our
17 revised number that we're bound to articulate, so as to not
18 prejudice the defendant at all, we're going to propose a number
19 that we think vastly understates the total criminal proceeds,
20 which Mr. Megaro stated would be a 60 percent cut, which would
21 be \$644,056.33.

22 THE COURT: Do you mind if I cut the 33 cents? That's
23 partly facetious. \$644,056, right?

24 MR. CHIUCHIOLO: Correct, your Honor. I do have a
25 revised order that notes this number. I left blank what the

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1 Court ultimately orders, but if the Court --

2 THE COURT: Please hand it to my deputy.

3 MR. CHIUCHILO: And just for the record, this is the
4 exact same order that the government previously submitted
5 except that it states in two locations the total amount the
6 government is seeking. It states the new number and then the
7 number that the Court is ordering just blank so the Court can
8 fill it in.

9 THE COURT: Yes.

10 Yes, I see on the proposed preliminary order, in the
11 decretal paragraph: "Now, therefore, it is ordered, adjudged
12 and decreed that," and the sum is entered. Correct?

13 MR. CHIUCHILO: Correct.

14 THE COURT: The government is now seeking \$644,056.33
15 in forfeiture from this defendant, which I take it is joint and
16 several with Mr. Gordon. Is that correct?

17 MR. CHIUCHILO: Correct, your Honor.

18 THE COURT: Let me just make sure that's in this order
19 as well.

20 And this is based on fraud scheme 2.

21 MR. CHIUCHILO: Correct, your Honor. The government
22 is seeking nothing from fraud scheme 1. And if I may just
23 explain the government's reasoning on this, your Honor.

24 As the Court knows, the government and the Court
25 received for the first time the defendant's position on

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1 forfeiture on July 17, which was the government's -- the
2 defendant's really first submission about their objections.
3 They previously, Mr. Duncan previously filed an objection, but
4 it basically just said the defendant is innocent, he shouldn't
5 have to pay a forfeiture.

6 THE COURT: If I remember correctly, Ms. Al-Shabazz
7 did not respond on the date set by the Court. Is that correct?

8 MR. CHIUCHIOLO: Correct, your Honor. There was a
9 submission that just said we object.

10 THE COURT: Yes.

11 MR. CHIUCHIOLO: But it didn't go into any detail, and
12 that's when the Court subsequently ordered the hearing.

13 On July 17, the government received, for the first
14 time, the defendant's position on forfeiture. We've been
15 looking -- and restitution. I think the first time the
16 defendant objected to restitution was through this submission.

17 THE COURT: Yes.

18 MR. CHIUCHIOLO: So we've been looking at the
19 defendant's arguments and investigating them.

20 On forfeiture, one of the arguments that the defendant
21 raises is a lot of the criminal -- a lot of the proceeds that
22 are listed on D&G's ledger come from non-trip-and-fall
23 accidents, from car accidents, from subway accidents. So we
24 investigated that claim, principally talking to a cooperating
25 witness who's very familiar with the D&G's operation and its

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1 revenue.

2 For the record, the government produced those notes to
3 defense counsel in this case. And the cooperator said
4 essentially, Look, I would have to sit down with you and go
5 through it one by one, but roughly, 40 percent of our cases
6 were trip and falls and the rest were nontrip and falls. In
7 total, around 80 percent of all cases were fraudulent, but of
8 all the cases, 40 percent were related to trip-and-fall cases.

9 Now, the government, as a matter of law, I don't
10 think, is precluded from seeking forfeiture for all fraudulent
11 cases because the indictment doesn't limit the allegations to
12 trip and falls, but the government recognized that it did not
13 put on proof at trial of non-trip-and-fall cases, so what we're
14 doing is taking the cooperator's statements, we're cutting the
15 60 percent he estimated were non-trip-and-fall cases.

16 Now, what the cooperator also said, the cooperating
17 witness also said was trip-and-fall cases are funded easier.
18 They're funded more quickly than car accidents, than
19 ceiling-collapse cases, so the ledger is going to understate
20 revenues for trip and -- it's going to understate, or I guess a
21 better way to say this is it -- more the revenues on the ledger
22 are going to be from trip-and-fall cases because they're funded
23 more easily. And the ledger is just, as you know, broker fees.
24 It's amounts that Bryan Duncan and his partner Kerry Gordon
25 received from funding companies.

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1 So even though only 40 percent, roughly 40 percent of
2 the cases are trip and falls, the ledger, which we based our
3 forfeiture ask on, is probably going to be 50, 60. It's going
4 to be larger, represent a larger percentage of trip and falls.
5 And that's what we wanted to further investigate. So we think
6 this 40 percent number is understates considerably what the
7 total amount of criminal proceeds would be.

8 Also, as your Honor knows, we're not seeking
9 forfeiture from fraud scheme 1. We're not seeking forfeiture
10 on cash that would have been paid to Mr. Duncan and Mr. Gordon
11 on fraud scheme 2. So this number is a very conservative
12 number.

13 THE DEFENDANT: Your Honor, can I speak to my
14 attorney?

15 THE COURT: Yes, sure.

16 MR. MEGARO: Your Honor, I just have to mute this
17 phone as I switch over to the other phone. Bear with me just a
18 moment.

19 THE COURT: Yes. Mr. Duncan is leaving the courtroom
20 in order to be able to speak with you.

21 MR. MEGARO: OK. Thank you.

22 (Defendant conferred with counsel)

23 MR. MEGARO: Thank you for the Court's patience, your
24 Honor. My client's making his way back in right now.

25 THE COURT: All right. I've returned.

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1 Mr. Megaro, what were you saying? I see Mr. Duncan in
2 the courtroom also. What would you like to say, Mr. Megaro?

3 MR. MEGARO: I was just saying thank you for the
4 accommodation, your Honor. My client should be making his way
5 back in, but if the Court wants me to respond --

6 THE COURT: No. I don't think Mr. Chiuchiolo is
7 finished because he hasn't said anything about restitution.
8 Mr. Duncan is in the courtroom.

9 Why don't you finish up, Mr. Chiuchiolo.

10 MR. CHIUCHILO: And it is the last point, the last
11 two points on forfeiture, for the reasons in the government's
12 submissions, D&G was a fraud mill. There were tons of
13 fraudulent cases. We have detailed citations in our
14 submissions as to why it's -- I believe the defense position is
15 only Jasmine Cunningham testified, but there's detailed --
16 first of all, it's more than just Jasmine Cunningham on the
17 ledger. There's numerous references to other individuals that
18 are in the record.

19 THE COURT: I remember those figures. The evidence on
20 fraud scheme 1 and fraud scheme 2 was very substantial, in my
21 mind, and the jury based its decision on the evidence. No
22 question.

23 MR. CHIUCHILO: So I'll move on, your Honor.

24 I just want to address very quickly the *Honeycutt*
25 argument that Mr. Megaro made.

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1 THE COURT: Yes. I've written on *Honeycutt*. I
2 understand that case. Go ahead.

3 MR. CHIUCHIOLO: Well, the only point I want to make
4 on that is the hypothetical that Mr. Megaro read, of course, is
5 not the case at all here. There's a, I think the hypothetical
6 involve a mastermind and a low-level worker. Of course, here,
7 Mr. Duncan and his partner were the masterminds.

8 THE COURT: On fraud scheme 2.

9 MR. CHIUCHIOLO: On fraud scheme 2.

10 THE COURT: And they were participants in fraud scheme
11 1.

12 MR. CHIUCHIOLO: Exactly. And again, on forfeiture,
13 we're only seeking forfeiture on fraud scheme 2.

14 THE COURT: I understand. They were 50 percent owners
15 of D&G.

16 MR. CHIUCHIOLO: Exactly, your Honor.

17 THE COURT: And not only that as opposed to fraud
18 scheme 1, in fraud scheme 2 they were the funders and were
19 taking even a higher cut than Kalkanis was taking.

20 MR. CHIUCHIOLO: I'll move on from the *Honeycutt*
21 argument.

22 As to restitution, your Honor, based on the
23 defendant's July 17 submission, here, we credit the arguments
24 made as to Colette Ford --

25 THE COURT: Wait. I have a chart on each of the six,

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1 so let me go to that.

2 Yes, sir. You're deleting your seeking restitution
3 for Ford.

4 MR. CHIUCHIOLO: Correct.

5 THE COURT: Correct.

6 MR. CHIUCHIOLO: Alvin Martin.

7 THE COURT: Martin.

8 MR. CHIUCHIOLO: And Anthony Pierre-Paul. So that's a
9 total reduction of \$452,000, meaning the new restitution
10 request from the government is \$275,000 -- 275,600 from the
11 government.

12 THE COURT: All right. Let me make some notes here.

13 All right. Thank you.

14 I've heard from the government. I've heard from the
15 defense on restitution and forfeiture.

16 Mr. Duncan, if there's anything you wish to say, as
17 I've told you, you certainly can tell me whatever you like. I
18 heard what you had to say the last time, in January. I think
19 you know my views in terms of your participation in these fraud
20 schemes. You've heard my telling you about your positive
21 attributes. As a matter of fact, you've referenced that I
22 think you're smart, I think you're ambitious, I think you're
23 enterprising, I think you have a way with words and you have a
24 way with people. You were able to bring people into this
25 scheme and work successfully with others. And I think you have

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1 a good future ahead of you, but it's a serious crime. You know
2 that, and it's a shame you used your skills in this manner.
3 You know all that. You know my views on that.

4 What would you like to tell me, if anything, sir? And
5 then I will render my decision.

6 THE DEFENDANT: I just want to ask --

7 THE COURT: Yes, of course. You want to talk to your
8 lawyer?

9 MR. MEGARO: I just want to ask him some questions.

10 THE COURT: Go ahead.

11 Mr. Duncan is leaving to speak to Mr. Megaro again.

12 MR. MEGARO: Thank you, your Honor. I will mute this
13 phone very briefly while I speak with him.

14 THE COURT: Yes, sir.

15 (Defendant conferred with counsel)

16 THE COURT: All right. Mr. Duncan has returned to the
17 courtroom.

18 Can you hear me, Mr. Megaro?

19 MR. MEGARO: Yes, your Honor. Thank you again.

20 THE COURT: Mr. Duncan, what would you like to tell
21 me, if anything?

22 MR. MEGARO: Your Honor, first I'd like to say thank
23 you for giving my new counsel, Patrick Megaro, an opportunity
24 to submit the objections to the restitution and the forfeiture.

25 As you know, I called your office. I was real

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1 emotional when I spoke to the deputy last month about it, but
2 I'm really happy that he was able to submit everything.

3 With respect to forfeiture, if you simply review --
4 like I told my attorney, if you simply review the ledger, there
5 are payments from plenty of entities that aren't even funding
6 companies. Just to name a few, and Ms. Al-Shabazz did name a
7 couple in February, Brooklyn Medical Surgical, Brooklyn Medical
8 Management. They have a couple of liaison companies here, and
9 a few more, Endure Management, but I don't want to go through
10 all of them right now. But I'm just saying that when you look
11 at it, you see that the government, they're just pulling
12 numbers from everywhere. We don't really know where they're
13 getting the numbers from. That's what I'll say for forfeiture.

14 With respect to restitution, if you look at the
15 restitution order, the government is saying that they're giving
16 me a reduction. Those names that were listed on the
17 restitution order -- Colette Ford, Alvin Martin, Anthony Paul
18 Pierre -- it's clear as day in the trial record, Alvin Martin
19 stated several times about his 2014 accident and the government
20 puts that on the restitution order.

21 Anthony Paul Pierre --

22 THE COURT: The government is dropping them. The
23 government may be agreeing with your opposition because they
24 are dropping their requests for restitution based on Ford, on
25 Martin and on Pierre-Paul.

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1 THE DEFENDANT: Yes, Pierre-Paul. There's a gentleman
2 named David Pierre. They say they're submitting an exhibit for
3 Anthony Pierre-Paul, but it's a David Pierre email.

4 THE COURT: Well, we don't have to worry about that at
5 this point because the government is not seeking forfeiture
6 from either of them.

7 THE DEFENDANT: Your Honor, I understand that. All
8 I'm saying is that if you look at everything, people are going
9 left and right, up and down. It's all over the place. So like
10 I said, I just want you to take that into consideration before
11 you make a decision.

12 THE COURT: All right. Thank you. I understand it.

13 Everybody having spoken, I'm going to do a variety of
14 things to conclude this now. The first thing was not on my
15 agenda, but I'm going to increase the amount of the variance
16 and decrease the sentence of Mr. Duncan from 80 months to 72
17 months for the same reason. The variance is for the same
18 reason put on the record on January 7 but with some distance
19 from the trial and the increasing percentage, as I understand
20 it, of nonfraudulent accidents from D&G, although it's still
21 what I think amount to hundreds of accidents, because I think
22 there were at least 300 people involved in D&G, and thinking
23 about the other sentences I've imposed, I do believe that 72
24 months is more appropriate than 80. Obviously, that's of great
25 importance to Mr. Duncan.

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1 Let's go to forfeiture.

2 Ms. Al-Shabazz had objected to the proposed forfeiture
3 order of \$1.6 million, and now it's \$644,056. I'm going to
4 delete the 33 cents because that gives a false sense of
5 exactitude to this process. The government is now seeking
6 \$644,056 in forfeiture. As I say, Ms. Al-Shabazz objected to
7 the forfeiture figure. I ordered a revised proposal to come
8 in. I deferred the issue of restitution.

9 In terms of forfeiture, "It is well-settled in the
10 Second Circuit that once a defendant is convicted of an offense
11 on proof beyond a reasonable doubt, the government is only
12 required to establish the forfeitability of the property
13 subject to criminal forfeiture as a result of that offense by a
14 preponderance of the evidence" -- and I think that's important
15 here. *United States v. Schlesinger*, 396 F.Supp.2d 267, 271
16 (E.D.N.Y. 2005) (citing *United States v. Fruchter*, 411 F.3d
17 377, 383 (2d Cir. 2005)), affirmed 514 F.3d 277 (2d Cir.
18 2008)).

19 The government has submitted a proposed forfeiture
20 order, pursuant to 18 U.S.C. 981(a)(1)(C) and 28 U.S.C.
21 2461(c), seeking entry of a money judgment -- up until last
22 night, it was \$1,610,000, and as I say, now it's \$644,056 --
23 which represents the proceeds traceable to the commission of
24 Counts Four, Five and Six. Under 18 U.S.C. 981(a)(1)(C) "[a]ny
25 property, real or personal, which constitutes or is derived

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from proceeds traceable" to mail or wire fraud, or a conspiracy to commit such offense, "is subject to forfeiture to the United States." "[T]he term 'proceeds' means property of any kind obtained directly, or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense." *Id.* Section 981(a)(2)(A).

The government has to establish by a preponderance that \$644,056 constitutes proceeds traceable to Duncan's criminal conduct by a preponderance, and that the forfeiture order is going to be joint and several with Mr. Gordon, because the government is only seeking forfeiture from fraud scheme No. 2, which was the D&G fraud scheme. And that's Counts Four, Five and Six of superseding indictment 1.

"The government is not seeking forfeiture from the 2012 -- 2015 fraud scheme, fraud scheme 1. Therefore, it's alleged, and I think it's true, that the forfeiture they're seeking is a very conservative amount of the total money that Mr. Duncan obtained from his participating in both fraud schemes.

At some point in 2015, Duncan and Gordon stopped working with Kalkanis and began operating a separate but substantially similar fraud scheme, and we've always called that fraud scheme 2. Duncan and Gordon formed their own

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1 company, D&G Premier Solutions LLC, which they used to receive
2 their case management fees. (Presentence report at paragraph
3 26.) Duncan and Gordon were joint 50-50 owners and were the
4 company's only employees. (Trial transcript, 908, 949.) The
5 gross profit that D&G made from January 2015 through the end of
6 2018 was the 1.6 million figure that the government originally
7 used here. (Trial transcript at 917; Government Exhibit 807;
8 presentence report at paragraph 26.)

9 Fraud scheme 2 employed many of the same lawyers,
10 doctors and runners as fraud scheme 1. (Trial transcript 814
11 and 1490 and 1491.) Duncan also used the same primary funding
12 company. (Transcript at 814 to 815.) I do conclude that the
13 government has proven the much-reduced figure of \$644,000 by a
14 preponderance of the evidence, which is a conservative estimate
15 of the proceeds traceable to Duncan's criminal conduct.

16 The government does not have to prove that every
17 dollar generated by D&G Premier Solutions LLC was a result of
18 criminal activity. "The calculation of forfeiture amount is
19 not an exact science." *United States v. Treacy*, 639 F.3d 32,
20 48 (2d Cir. 2011). "'The court need not establish the loss
21 with precision but rather need only make a reasonable estimate
22 of the loss, given the available information.'" *Treacy*
23 (quoting *United States v. Uddin*, 551 F.3d 176, 180 (2d Cir.
24 2009)).

25 Although Duncan identified four clients in the D&G

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1 ledger who had "legitimate motor vehicle accident[s] or general
2 negligence cases" -- from the July 17 letter of Mr. Megaro that
3 he discussed earlier, at page 9 -- and indeed, the government
4 has indicated that there were legitimate motor vehicle
5 accidents or general negligence cases on the ledgers which were
6 submitted into evidence here -- Duncan failed to substantiate
7 his claims as to legitimate motor vehicle accidents. Without
8 specific evidence showing that certain claims were fraudulent,
9 his general challenge is unsuccessful. And again, given the
10 significant reduction from 1.6 million down to 644,000, by a
11 preponderance, that does represent the proceeds Duncan derived
12 from fraud scheme 2.

13 Now, Mr. Megaro also makes an Eighth Amendment claim,
14 saying that this violates the Eighth Amendment prohibition
15 against excessive fines. There's no merit to that. I employed
16 the two-step inquiry established in *United States v.*
17 *Bajakajian*, 524 U.S. 321 (1998), for determining whether a
18 financial penalty is excessive. First, I have to determine
19 whether the excessive-fines clause applies at all. *United*
20 *States v. Viloski*, 814 F.3d 104, 109 (2d Cir. 2016). It does
21 apply, so I then proceed to the second step and determine
22 whether the forfeiture is unconstitutionally excessive. "The
23 burden rests on the defendant to show the unconstitutionality
24 of the forfeiture." *Id. Bajakajian* (citing *United States v.*
25 *Costello*, 611 F.3d 116, 120 (2d Cir. 2010)).

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1 The excessive-fines clause does apply because the
2 forfeiture order is punitive in nature and "could not have been
3 imposed upon an innocent party."

4 I do assess whether "it is grossly disproportional to
5 the gravity of [Duncan's] offense" using the four *Bajakajian*
6 factors, and applying those factors, each weighs firmly against
7 the finding that the proposed order is grossly disproportional
8 to the gravity of Duncan's offense.

9 Duncan was involved in two separate multiyear
10 conspiracies involving repeated instances of mail and wire
11 fraud to exploit the most vulnerable individuals in our society
12 and to defraud insurance companies. Everyone remembers the
13 testimony of Mr. Duncan's parking near a homeless shelter and
14 recruiting people from the homeless shelter for his scheme,
15 repeated instances of people actually undergoing serious back
16 surgeries, some of which turned out bad and left people with
17 lasting pain, and the surgeries were absolutely unnecessary.
18 The seriousness and the magnitude of these two fraud schemes is
19 shocking. People were so poor that sometimes they would ask at
20 first meeting with Kalkanis, the lawyer, or the doctors for
21 food because they didn't have enough money for food and they
22 hadn't eaten. We heard the testimony.

23 Duncan falls comfortably within those persons for whom
24 the mail and wire fraud statutes were designed, those who use
25 facilities of interstate commerce to engage in fraudulent

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schemes. See *United States v. Finazzo*, 2014 WL 3818628, at *33 (E.D.N.Y. Aug. 12, 2014) vacated and remanded on other grounds, 850 F.3d 94 (2d Cir. 2017), and affirmed in part, 682 F.App'x 6 (2d Cir. 2017).

Let's not forget that the guideline range here is 324 to 405 months. The maximum fine is \$240 million. The maximum fine is hundreds of times more than the proposed forfeiture order of \$644,000, which would certainly suggest that Congress did not view offenses such as Mr. Duncan's as trivial. That weighs in favor of the forfeiture's constitutionality. See *Viloski*, 814 F.3d at 114; See *United States v. 817 N.E. 29th Drive, Wilton Manors, Fla.*, 175 F.3d 1304, 1310 (11th Cir. 1999), in terms of the process I engaged in.

The nature of the harm caused by Mr. Duncan's conduct was extensive.

Now, Mr. Megaro notes, properly, that during our more recent telephone conference of July 10, I acknowledged that it was extremely unlikely that Mr. Duncan would be able to pay a substantial judgment over the course of his lifetime -- that's the defendant's July 17 letter that Mr. Megaro has been referring to, at page 11, citing the July 10 transcript at page 15 -- and Mr. Duncan, therefore, urges on the Court that the proposed forfeiture amount would deprive him of his livelihood. That does not follow at all. Mr. Duncan still has the ability to continue earning his livelihood. I would hope the

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1 government does pursue the forfeiture order, assuming the
2 conviction is affirmed. Mr. Megaro has indicated Mr. Duncan
3 intends to appeal, and it certainly is his right, because he
4 can still rest on his innocence, which is his total right. But
5 even with the forfeiture order, he'll certainly be able to earn
6 a living. In fact, the government's better off to the extent
7 Mr. Duncan continues to earn a living after he's released from
8 prison. The gravity of the conduct and the extensive harm
9 Mr. Duncan caused certainly supports the government's
10 much-reduced proposed figure. The proposed forfeiture amount
11 is not disproportional to the gravity of Mr. Duncan's conduct,
12 and I reject his Eighth Amendment challenge.

13 I am going to sign the order of forfeiture in the sum
14 of \$644,056 joint and several with Mr. Gordon.

15 Now, let's turn to restitution.

16 Restitution is different here. The government here is
17 seeking restitution from Mr. Duncan for his involvement in
18 fraud scheme 1 only, and the government claims to be including
19 "only those patients who were part of fraud scheme 1 before
20 Mr. Duncan withdrew, or for whom there is evidence showing that
21 Duncan remained involved with their cases." That's the March 7
22 letter of the government, at page 8.

23 Until today, the government had identified six
24 patients who fit those criteria and calculated the proposed
25 restitution figure at \$727,600. This morning the government

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1 has indicated that it is dropping its claims for restitution
2 against Mr. Duncan for three patients -- Ms. Ford, Mr. Martin
3 and Mr. Pierre-Paul -- and now it is seeking \$275,600 in
4 restitution.

5 I do find the government has not established that that
6 is an appropriate figure for restitution by a preponderance of
7 the evidence. It is seeking restitution based on Corey
8 Chandler, Byron Thomas and Joseph Toussaint. Those cases were
9 filed by Marc Elefant, an attorney that began working with
10 Kalkanis at a time when Duncan had already withdrawn from fraud
11 scheme 1. The government wishes to show that Duncan
12 nonetheless remained involved in those patients' cases by
13 including emails between Duncan and a conspiring doctor. The
14 emails attach the doctor's daily schedule with the names of 11
15 to 15 patient names, but the government failed to provide any
16 evidence that Duncan was seeking information about these
17 patients specifically. It has not shown by a preponderance
18 that Duncan remained involved in their cases.

19 I'm not going to enter the government's proposed
20 restitution order. I do wish to note that the Court's analysis
21 on restitution applies only to Duncan and Kerry Gordon, who
22 withdrew from fraud scheme 1 in 2015 to begin fraud scheme 2.
23 This analysis on restitution is not relevant to those
24 coconspirators who were in fraud scheme 1 and did not withdraw
25 to join fraud scheme 2.

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1 All right. I'm not entering restitution. I have
2 entered a forfeiture order. I have said that I'm going to
3 impose the 72 months rather than 80 months, the variance, for
4 the same reasons set forth on January 7, and with everything
5 else that I said on January 7: Three years supervised release,
6 mandatory and standard conditions; no fine, same recommendation
7 to the Bureau of Prisons. The reason for variance is the same.
8 The recommendation is that Mr. Duncan be housed in the tristate
9 area to facilitate family visits. And obviously I've adopted
10 the findings of fact. Everything from January stays the same
11 and is part of this proceeding except the change from 80 months
12 to 72.

13 MR. CHIUCHILO: Your Honor, just so I understand the
14 change from 80 to 72, when you say because of the variance, are
15 you referring to the reasons why the Court varied downward from
16 the guidelines sentence?

17 THE COURT: Yes.

18 MR. CHIUCHILO: Understood.

19 THE COURT: I'm not sure where that question comes
20 from. Could there be anything else?

21 MR. CHIUCHILO: Well, I know that there was arguments
22 about relative culpability, and that's why I wanted to just
23 make sure.

24 THE COURT: I am thinking about the other sentences
25 I've imposed, yes.

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1 MR. CHIUCHIOLO: Well, just respect to that issue,
2 which was the relative culpability, it's the government's
3 position that Mr. Duncan was far more culpable than the other
4 two defendants.

5 THE COURT: OK. All right. Thank you.

6 It's six years. Six years, 72 months.

7 The \$100 assessment is due immediately. I'm sorry.
8 It's not \$100. Just a moment.

9 The \$400 assessment is due immediately. Again,
10 everything from the January sentence.

11 I've employed all of the factors in 3553. It's
12 appropriate, given the seriousness of the offense and given the
13 need for punishment and deterrence.

14 I'm setting the surrender date as October 2.
15 Mr. Duncan shall surrender for service of sentence at the
16 institution designated by the Bureau of Prisons on or before 2
17 p.m. on October 2, 2020.

18 Mr. Megaro, are you aware of any legal reason why the
19 sentence should not be imposed as I have stated it?

20 MR. MEGARO: No, your Honor. There's no reason why
21 sentence should not be imposed.

22 I don't know if the Court wants me to make my
23 objections now or in a moment, because the Second Circuit has
24 taught me the hard way, that if I do not make an objection at
25 the time sentence is imposed, then the issues regarding

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1 sentence are waived, and I certainly don't want to do that, so
2 I'll leave it to the Court as to when I should bring it up.

3 THE COURT: Mr. Chiuchiolo, do you know of any legal
4 reason why the sentence should not be imposed as stated?

5 MR. CHIUCHILO: No, your Honor.

6 THE COURT: I hereby order the sentence to be imposed
7 as stated.

8 Mr. Megaro, why don't you put on the record whatever
9 you wish to put on.

10 MR. MEGARO: Thank you, your Honor.

11 As I said, the Second Circuit has taught me to object
12 to the sentence and forfeiture order, and I'm not going to
13 belabor the point, but this is going to be based on the reasons
14 set forth by Ms. Al-Shabazz, my predecessor, in her presentence
15 submissions, including her objections to the presentence
16 report, the statements she made on the record on January 7,
17 2020, and all of the proceedings that followed since then, most
18 especially my July 17, 2020, submission as to everything that I
19 said here on the record here today.

20 That being said, I believe my objection has been
21 properly made. I have advised Mr. Duncan of his right to
22 appeal. I have been retained to prosecute his appeal, and I
23 will do that with undue delay.

24 There is only one other minor request of Mr. Duncan,
25 if that can be made, and that is concerning the conditions of

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1 his release.

2 As the Court is well aware, he's more or less been on
3 home confinement since the Court released him, which I believe
4 was May of last year. He is asking the Court if the Court
5 would consider, perhaps, loosening some of those restrictions
6 to allow him to go outside of the home to run some family
7 errands and spend time with family and to do certain other
8 things in preparation for his surrender on October the 2nd.

9 THE COURT: What's the position of the government?

10 MR. CHIUCHIOLO: The government doesn't have an
11 objection to allowing the defendant to leave his home for those
12 reasons articulated by the defense.

13 THE COURT: All right. I am going to alter the
14 conditions of home confinement to the extent that Mr. Duncan
15 may leave his home, if he has the permission of his probation
16 officer, for such visits as medical visits and to prepare for
17 his incarceration. But each time he leaves the home, it will
18 have to be with the permission of his probation officer.

19 Mr. Duncan, you have the right to appeal the sentence
20 I just imposed on you, sir. If you cannot pay the cost of an
21 appeal, you have the right to apply for leave to appeal *in*
22 *forma pauperis*. If you make a request, the clerk of court will
23 prepare and file a notice of appeal on your behalf immediately.

24 Do you understand your appeal rights?

25 THE DEFENDANT: Yes, your Honor.

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1 THE COURT: All right.

2 Government, are you moving to withdraw certain counts?

3 MR. CHIUCHIOLO: Yes, your Honor. This Court
4 previously declared a mistrial as to Counts Two and Three of
5 the superseding indictment. At this time the government would
6 move to dismiss Counts Two and Three of the superseding
7 indictment as to Mr. Duncan.

8 THE COURT: Granted.

9 Anything else, Mr. Chiuchiolo?

10 MR. CHIUCHIOLO: No, your Honor. Thank you.

11 THE COURT: Anything else, Mr. Megaro?

12 MR. MEGARO: No. Thank you, your Honor, for your
13 understanding and compassion.

14 THE COURT: All right. Thank you, all. I appreciate
15 it.

16 Good luck to you, Mr. Duncan. You know how serious I
17 view this crime. You're going to serve your time in prison and
18 then you'll have met your obligations, assuming you pay the
19 forfeiture, and you'll be able to move on with your life.

20 Thank you, sir.

21 (Adjourned)